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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

In the Matter of the Application of PacifiCorp dba Utah Power & Light Company for Approval of Changes to its Electric Service Schedules	PacifiCorp's Petition for Reconsideration Of Order No. 29034 PAC-E-02-1

Pursuant to Idaho Code § 61-626 and Commission Rules of Procedure 331.01 *et seq.* (IDAPA 31.01.01.331.01 *et seq.*), PacifiCorp, dba Utah Power & Light Company ("PacifiCorp" or the "Company") hereby petitions this Commission for reconsideration of its determination in its Order No. 29034, issued June 7, 2002 ("Order"), that PacifiCorp failed to provide adequate notice to its customers in violation of Rule 102 of the Commission's Utility Customer Information Rules (IDAPA 31.21.02.102) ("Rule 102") and its finding that a $20 per customer credit, or a total of $1,087,720, is an appropriate penalty under Idaho Code § 61-701 *et seq.* for said violation.

Reconsideration of the above-referenced findings is warranted because: (1) Rule 102 does not apply to this proceeding which is neither a general nor a tracker rate case; (2) even if Rule 102 applies and bill-stuffer notice as prescribed therein was required, the Commission's finding that it could impose a remedy pursuant to Idaho Code Chapter 61, Title 7 for violation of that Rule was contrary to the law and, accordingly, any remedy imposed thereunder unlawful; (3) even if Rule 102 applies, the Commission failed to afford the Company a full and

fair opportunity to be heard regarding the circumstances surrounding the alleged violation and determination of the appropriate penalty (if any), violating the Company's constitutional and statutory due process rights; (4) the Commission misinterpreted the penalty provisions of Idaho Code § 61-701 *et seq.* when it found that the maximum penalty applies on a per customer basis; (5) the Commission exceeded its authority under Idaho Code § 61-701 *et seq.* when it required payment of the penalty to customers instead of to the Idaho State Treasury; and (6) the penalty imposed is excessive in comparison to the violation and contrary to Commission precedent.

BACKGROUND

Faced with an extreme and increasing disparity between the purchased power costs it was recovering in its prices and the costs it was incurring, on November 1, 2000, PacifiCorp filed an application in Case No. PAC-E-00-5 for approval to defer excess net power costs incurred from November 1, 2000 through October 31, 2001. In Commission Order No. 28630, the Commission approved the Company's request for deferred accounting of those excess power costs. Pursuant to that deferral authority, the Company deferred $37 million in excess power costs.

On January 7, 2002, PacifiCorp filed the Application in this case ("Application") seeking to recover over a two-year period those deferred excess net power costs, with carrying charges, amounting to approximately $38 million. The Company further proposed electric service schedules that would adjust rates to bring customer classes closer to the cost of serving the respective classes and to implement an increase to the Electric Service Schedule No. 34-BPA Exchange Credit to reflect the increased benefit from a settlement with the Bonneville Power Administration regarding residential exchange benefits. Further, the Company proposed a Rate Mitigation Adjustment ("RMA") designed to result in no customer classes receiving an increase during the two-year period of the Power Cost Surcharge ("PCS").

On January 31, 2002, in its Order No. 28946, the Commission approved Electric Tariff Schedule 34-BPA Exchange Credit using Modified Procedure, *i.e.,* by written submission rather than by hearing. The remainder of the Company's filing was processed separately.

Settlement discussions were held among the parties on February 19, March 5, 20 and 28, 2002. As a result of those settlement conferences, all parties except one[1] reached an agreement and, on April 11, 2002, PacifiCorp, Commission Staff, the Idaho Irrigation Pumpers Association, and Monsanto Company filed a Stipulation and Proposed Settlement with the Commission for approval ("Stipulation").

On April 22, 2002, the Commission issued a Notice of Stipulation and Proposed Settlement, Notice of Scheduling, Amended Notice of Hearing(s), and Notice of Workshop(s). Order No. 29008. Pursuant to that Notice, the Commission scheduled two public hearings, preceded by public workshops, which were held in Rigby and Preston on May 6 and 7, 2002. In addition, an evidentiary hearing was held on May 7 at which testimony supporting and opposing the Stipulation was heard.

On June 7, 2002, the Commission issued its Order No. 29034 approving as fair, just and reasonable the proposed Stipulation with one modification.[2] The Order also awarded intervenor funding to the Idaho Irrigation Pumpers Association and Timothy Shurtz. Finally, the Order directed PacifiCorp to provide each of its Idaho customers with a one-time credit of $20 for "failure to provide the individual customer notice required by Rule 102 of the Commission's Customer Information Rules."

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[1] Intervenor Timothy Shurtz did not join the Stipulation.

[2] The Commission determined that Nu-West is a contract customer not subject to the Power Cost Surcharge.

ARGUMENT

A. Rule 102 Does Not Apply to this Proceeding Which is neither a General nor a Tracker Rate Case.

In its Order, the Commission noted that Rule 102 requires individual notice of a utility's application for a general or tracker rate change. (Order at 23.) The Commission went on to find, without further explanation, "that the Company's Application in this case is of such nature that Rule 102 notice was required." (*Id.*) As demonstrated below, however, under the express language of the Rule that finding is incorrect. Because this proceeding is neither a general rate case nor a tracker rate case, Rule 102 does not apply and bill-stuffer notice to customers was not required.

For purposes of notice, Commission rules distinguish among three types of proceedings: (1) general rate cases; (2) tracker rate cases; and (3) cases that are neither general rate cases nor tracker rate cases, or "others." Not surprisingly, general rate cases require notice that other types of proceedings do not. Pursuant to Commission Rule of Procedure 122, utilities with annual gross revenues from Idaho retail customers exceeding $3 million (like PacifiCorp), are required to file with the Commission a "notice of intent to file a general rate case" at least 60 days before filing a general rate case. IDAPA 31.01.01.122.01. That requirement expressly does not apply to tracker or "other" types of rate cases:

> **Exceptions for Trackers, etc.** This rule applies only to general rate increases. Examples of cases outside the scope of this rule include (but are not limited to) fuel, power cost adjustment (PCA), commodity or purchased power tracker rate increases, emergency or other short-notice increases caused by disaster or weather-related or other conditions unexpectedly increasing a utility's expenses, rate increases designed to recover governmentally-imposed increases in costs of doing business, such as changes in tax laws or ordinances, or other increases designed to recover increased expenses arising on short notice and beyond the utility's control. IDAPA 31.01.01.122.02.

By its text, then, Rule 122.02 distinguishes among: (1) general rate increases; (2) "fuel, power cost adjustment (PCA), commodity or purchased power *tracker rate increases*"; and (3) other rate increases, such as "emergency or other short-notice increases caused by * * * conditions unexpectedly increasing a utility's expenses" or "other increases designed to recover increased expenses arising on short notice and beyond the utility's control."

Consistent with those distinctions, Commission Utility Customer Information Rule 102, entitled "**Customer Notice of General Rate Cases and Tracker Rate Cases,**" imposes additional notice requirements that apply to general and tracker rate cases, but not to "other" types of rate cases. Specifically, Rule 102.01 requires that "[e]ach gas, electric, and water utility *that applies for a general or tracker rate change* shall give to each customer a statement (customer notice) announcing the utility's application." (Emphasis added.) The Rule then goes on to specify information that must be included in the customer notice if the general or tracker rate change as requested will result in a rate increase.[3]

Finally, Idaho Code § 61-307 and Rule of Procedure 123 (IDAPA 31.01.01.123) require that 30-day notice to the Commission and to the public be given regarding *any* request for a rate change, be it a general, tracker, or "other" rate change. That statutory notice requirement is satisfied by "filing with the commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force, and the time when the change or changes will go into effect." Idaho Code § 61-307.

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[3] Notably, the Commission's Rules of Procedure make an explicit connection between Rule of Procedure 122 and Rule 102, and the two rules should be read consistently in recognition of that connection. Commission Rule of Procedure 121.01(c) requires that utility applications to change rates include, "[i]f the application is subject to Rule 122 [*i.e.,* 60-day advanced notice of intent to file a general rate change], when a *general change* in recurring rates is proposed, a statement showing how the application has been brought to the attention of affected customers under IDAPA 31.21.02.102." IDAPA 31.01.01.122.01 (emphasis added).

The distinctions among the three types of rate cases referenced in the Commission rules are further clarified by the characteristic traits each of those cases embodies. As this Commission is well aware, in a utility general rate case, every aspect of the utility's rates is considered to be "at issue." By contrast, items "at issue" in tracker cases are more limited than general rate proceedings. *See, e.g., Re Avista Corporation dba Avista Utilities-Washington Water Power Division*, Case No. AVU-G-00-3, Order No. 28496 (Sept. 1, 2000) (noting that Avista's application for authority to implement new rates and charges for natural gas service "is a limited gas tracker and not a general rate case"); *Re The Washington Water Power Company*, Case No. WWP-G-98-3, Order No. 27816 (Dec. 3, 1998) (finding annual tracker mechanism a "useful regulatory vehicle for tracking and adjusting * * * costs outside of a general rate case"). Like general rate cases, however, tracker rate cases have distinctive characteristics.

"Trackers," also known as Purchased Gas Cost Adjustment ("PGA") or Power Cost Adjustment ("PCA") mechanisms, are rate adjustment mechanisms designed to recover or refund variances in certain types of utility expenses or costs. *See, e.g., Intermountain Gas Company*, Case No. INT-G-00-2, Order No. 28578 (Dec. 15, 2000) ("PGA is a tracker mechanism that allows the [Intermountain Gas] Company to adjust consumer gas prices to reflect its purchase cost (WACOG) and to recover the over- and under- collections that occur."); *Re The Washington Water Power Company*, Case No. WWP-E-96-4, Order No. 26533 (Jul. 30, 1996) (PCA rate adjustment mechanism "is designed to recover/rebate variances in net power supply expenses incurred"). In some years, trackers result in rate increases, in other years, rate decreases. *See Re Avista Corporation dba Avista Utilities-Washington Water Power Division*, Case No. AVU-G-00-3, Order No. 28496 (Sept. 1, 2000) (listing history of PGA trackers that have resulted in both increases and decreases).

Finally, "other" rate cases, such as the Company's Application in this case for a temporary power cost surcharge, tend to be limited in scope like tracker cases. Unlike tracker

cases, however, "other" types of rate cases do not involve a mechanism by which cost increases *and* decreases are tracked. Neither do "other" rate cases involve mechanisms that are in place for ongoing periods of time. Rather, the costs for which recovery is sought in "other" rate cases are finite and are related to a single episode of deferral that was in place for a specific period of time. *See Re Idaho Power Company*, IPC-E-92-10, Order No. 24308 (May 13, 1992) (implementing temporary drought surcharge as distinguished from a PCA).

The limited nature of PacifiCorp's Application in this case precludes its classification as a general rate case.[4] Neither can it be classified as a tracker rate case. As this Commission noted in its order authorizing deferral of the Company's excess power costs (Case No. PAC-E-00-5, Order No. 28630), "PacifiCorp does not have a Power Cost Adjustment ("PCA") or an existing deferral to adjust for excess net power costs like Idaho Power or Avista Utilities." The Commission recognized, however, that the Company had incurred "unanticipated and extraordinarily high power costs * * * as a result of the wholesale market" and, accordingly, authorized 100% deferral of those costs for a limited period of time (November 1, 2000 through October 31, 2001). The Company's subsequent Application in this proceeding to recover those deferred costs over a two-year period requested authorization to implement a temporary rate surcharge—not a permanent tracking mechanism.

The Commission acknowledged the distinction between an application to implement a temporary surcharge and an application for approval of a tracker mechanism in *Re Idaho Power Company*, IPC-E-92-10, Order No. 24308 (May 13, 1992). In that case, Idaho Power requested authorization to implement a temporary drought surcharge that would remain in effect for one year. In considering whether to approve the requested surcharge, the Commission noted that temporary rate surcharges are justified "when actual conditions vary

[4] In its Order, the Commission found that the statutory notice requirements had been satisfied in this case, apparently also concluding that Rule 122 (60-day advance notice of intent to file a general rate case) was not required and agreeing that this is not a general rate case.

from ratemaking assumptions to the extent that it can be fairly said that the actual conditions are beyond the range of expectations used in ratemaking assumptions." Finding that six years of drought had placed Idaho Power's operations and financial condition "beyond the range of expectations used in ratemaking assumptions," the Commission approved the temporary surcharge. Rather than impose a surcharge, several parties in that case urged the Company and the Commission to implement some form of tracker mechanism, or PCA "to avoid the need for surcharge cases and to ensure the fair treatment of ratepayers during good as well as poor water years." The Commission noted, however, that the case had not been initiated for that purpose and was not the appropriate forum for ruling on a PCA.

As acknowledged by the Commission in its order authorizing deferral of PacifiCorp's excess power costs, the costs for which the Company sought recovery in this proceeding resulted from wholesale market conditions that were "unanticipated" and "extraordinary," satisfying the criterion announced in the Idaho Power drought surcharge proceeding for justification of a temporary rate surcharge. The Company's filing in this proceeding was not initiated for the purpose of implementing a tracker mechanism, nor was ongoing tracking of the Company's over- or under-collection of power costs ever even discussed. In short, this proceeding can only be characterized as a request for a temporary rate surcharge or "other" rate case—not a general or a tracker rate case.

As noted above, the only notice required for rate cases other than general or tracker rate cases is the 30-day notice prescribed by Idaho Code § 61-307 and Rule of Procedure 123. In its Order the Commission found that PacifiCorp satisfied its statutory notice requirements in this case. Because Rule 102 expressly applies only to general or tracker rate cases, the notice

requirements contained therein do not apply to this "other" type of rate proceeding.[5] Accordingly, the Commission erred when it found that Rule 102 applied to the Company's Application in this case.

B. Even if Rule 102 Applies and Bill-stuffer Notice as Prescribed Therein was Required, the Commission's Finding that It could Impose a Remedy Pursuant to Idaho Code Chapter 61, Title 7 for Violation of that Rule was Contrary to the Law and, Accordingly, Any Penalty Imposed Thereunder is Unlawful.

Even if Rule 102 could be interpreted to apply to requests for temporary rate surcharges, the only remedy authorized for violation of that Rule is return of the application to the filing utility.

Specifically, Rule 102.05, entitled "**Purposes and Effects of this Rule**" provides:

> The purposes of Rule Subsections 102.01 through 102.04 of this rule are to encourage wide dissemination to customers of information concerning proposed rate changes for utility services. It is not a purpose of these paragraphs to create due process rights in customers by expanding, contracting, or otherwise modifying the notice and due process rights of customers under the Public Utilities Law and the Commission's Rules of Procedure, IDAPA 31.01.01.000 et seq. Accordingly, Rule Subsections 102.01 through 102.04 of this rule create no individual procedural rights in any customer for notice that would give rise to a due process or other procedural claim cognizable by the Commission, *but failure to comply with this rule can be grounds for returning an application for incompleteness*.[6] (Emphasis added.)

In its Order, the Commission acknowledged that under Rule 102.05, failure to comply with the Rule 102 notice requirements creates no due process or other procedural rights in

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[5] This interpretation is consistent with prior Commission application of Rule 102. The Company was unable to find any proceedings other than general and tracker rate cases in which Rule 102 has been found to apply. If the Commission disagrees with the Company's interpretation of Rule 102 and determines that that Rule applies to "other" as well as general and tracker rate cases, that determination should be applied only prospectively. Absent sufficient notice that the Commission would interpret and apply the Rule as it did in this case, the Company should not be penalized for its interpretation which is reasonable in light of both the text of the Rule and Commission precedent.

[6] Similarly, one of the remedies prescribed by Commission Rule of Procedure 65 for defective or insufficient pleadings is their return. IDAPA 31.01.01.065.

customers. Nevertheless, it went on to find that a violation of that Rule "triggers Commission powers to affect an appropriate remedy under the provisions of Title 61, Chapter 7." As evinced by the text of the Rule itself, however, the only "effect" of failing to provide bill-stuffer notice as prescribed therein is return of the application.

This interpretation of the Rule is consistent with prior interpretations afforded it by the Commission and its Staff. In *Re Avista Corporation dba Avista Utilities-Washington Water Power Division*, Case No. AVU-E-00-2, Order No. 28366 (May 2, 2000), a case that involved an application by the utility proposing a PCA tracker rate change, Staff in its comments on the utility's application pointed out that the utility's notice to its customers in that proceeding "was once again deficient" under Rule 102. Accordingly, "Staff remind[ed] the Company that according to the Utility Customer Information Rules, any application that changes rates can be returned as incomplete if the customer notice is not included." In a subsequent order issued in the same proceeding, Order No. 28402 (Jun. 13, 2000), Avista Utilities-Washington Water Power Division responded that its failure to comply with Rule 102 requirements was merely an "oversight." Notwithstanding that this was not the first time the company had violated Rule 102,[7] the application was not returned (nor was any other penalty imposed). Instead, the

[7] The preceding year in a general rate case, Staff noted Avista Utilities-Washington Water Power Division's failure to comply with the Customer Information Rules' requirement of individual customer notice. In that proceeding as well, the company characterized its omissions as administrative oversights. In response, the Commission "encourage[d] the Company to pay greater attention to the details of regulatory compliance" and declined to include an equity adder that had been requested by the company as a "reward" for its "innovative management and strategic initiatives." *Re The Washington Water Power Company*, Case No. WWP-E-98-11, Order No. 28097 (Jul. 29, 1999).

Avista Utilities-Washington Water Power Division petitioned for reconsideration of the Commission's decision to deny its equity adder, characterizing denial of the adder as "unduly harsh" and noting that it had been forthright in acknowledging its "inadvertent failure" to notice individual customers and had promptly remedied the notice deficiencies. The Commission denied the petition, finding no reason to reconsider its finding that the company had failed to satisfy the minimum threshold qualification for equity adder consideration and noting that it had not taken away anything to which the company was otherwise entitled. *Re The Washington Water Power Company*, Case No. WWP-E-98-11, Order No. 28155 (Sept. 16, 1999).

Commission "caution[ed] the Company that repeated instances of oversights will demonstrate an unacceptable pattern of neglect."

Similarly, in *Re Intermountain Gas Company*, Case No. INT-G-99-1, Order No. 28068 (Jun. 4, 1999), Staff noted that the company's failure to provide advance individual notice of its proposed PGA tracker rate change was grounds for returning the application for incompleteness, citing Rule 102.05. Because it was assured individual notice was in the process of being prepared, Staff instead recommended suspending the effective date of the filing 30 days to allow individual notice to be provided. In a subsequent order in the same proceeding, the Commission agreed that the remedy for failure to comply with Rule 102 was to return the application for incompleteness. Order No. 28087 (Jul. 1, 1999). The Commission chose instead, however, to adopt Staff's recommendation and suspend the proposed effective date for 30 days.

Rule 102.05 and the precedent cited above make clear that the most severe consequence, or effect, that can result from failure to provide notice pursuant to Rule 102.01-102.04 is return of the utility's application on the grounds that it is incomplete. Although the selection and application of an administrative penalty generally is vested in the Commission's discretion, the penalty imposed must be within the authority grated to the Commission. *See generally Pence v. Idaho State Horse Racing Commission*, 705 P.2d 1067 (Idaho App 1985) (so noting; upholding sanction as within agency authority). Because the imposed penalty in this proceeding is not authorized by the Rule, the Commission's conclusion that violation of Rule 102 triggers the penalty provisions of Chapter 61, Title 7 is contrary to the law and, accordingly, the penalty imposed upon the Company thereunder is unlawful.

C. Even if Rule 102 Applies to this Proceeding, the Commission's Decisions Respecting Violation of that Rule and the Appropriate Remedy are in Violation of the Company's Constitutional and Statutory Due Process Rights.

1. Federal and State Constitutional Due Process Violations.

The Fourteenth Amendment to the United States Constitution prohibits any state from depriving any person "of life, liberty or property, without due process of law." U.S. Const. amend. XIV. Due process of law also is guaranteed under the Idaho Constitution, which reads: "[N]o person shall be * * * deprived of life, liberty or property without due process of law." Idaho Const. art. 1 § 13. Although the Idaho Supreme Court has held that the due process guarantees derived from the United States and Idaho Constitutions are not necessarily the same, *Cootz v. State*, 785 P.2d 163 (Idaho 1989), the right to procedural due process guaranteed under both constitutions requires that a person be given meaningful notice and a meaningful opportunity to be heard. *Rudd v. Rudd*, 666 P.2d 639, 642 (Idaho 1983); *see also Re Idaho Power Company,* Case No. IPC-E-02-3, Order No. 28995 (April 8, 2002) (procedural due process satisfied when individuals provided with notice and opportunity to be heard; to satisfy due process requirement, opportunity to be heard must occur "'at a meaningful time and in a meaningful manner'") (quoting *Sweitzer v. Dean*, 798 P.2d 27 (Idaho 1990)).

There can be no question that the Commission's decisions in its Order respecting violation of Rule 102 and the appropriate remedy for the alleged violation of that Rule did not follow a hearing in which the Company had either meaningful notice that its compliance with Rule 102 was at issue or an opportunity to meaningfully address issues raised by the suggestion that the Rule had been violated.

The Idaho Supreme Court has held that procedural due process requires that "[t]he procedure chosen by the Commission must of course give the parties fair notice *of exactly what the Commission proposes to do*." *Intermountain Gas Co. v. Idaho Public Utilities Commission*, 540 P.2d 775, 791 (Idaho 1975) (emphasis added) (quoting *American Public Gas*

Association v. Federal Power Commission, 498 F.2d 718 (D.C. Cir. 1974), internal quotation marks omitted). In this case, PacifiCorp was not informed by the Commission after it filed its Application that the Commission considered the Application to be incomplete in any way or that, pursuant to Rule 102.05, the Application was subject to return for failure to comply with Rule 102.01 through 102.04. It was not until May 6, 2002—four months after the Company filed its Application—at the public hearing to consider the reasonableness of the Stipulation, that Scott Woodbury, counsel for Commission Staff questioned James Fell, counsel for PacifiCorp, about whether bill-stuffer notice of the Company's Application had been provided. The Company responded to that inquiry by letter dated May 15, 2002 and heard nothing more from the Commission regarding the issue until the Commission issued its Order finding a violation and imposing a penalty. Under these circumstances, the Company was not adequately noticed of "exactly what the Commission [was proposing] to do," *i.e.,* find that a Rule 102 violation had occurred and that a financial penalty was the appropriate remedy for such a violation. *See Intermountain Gas Co.*, 540 P.2d at 791 (notice that was not provided until company witnesses were cross-examined four months after company filed its application was late and defective).

As noted, the fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Sweitzer*, 798 P.2d 27, 32. "Due process requires that a party to contested proceedings before the commission must be afforded a full opportunity to meet the issues." *Washington Water Power Co. v. Idaho Public Utilities Commission*, 372 P.2d 409, 411 (Idaho 1962). In this case, PacifiCorp did not have an opportunity to meaningfully and fully address whether or how Rule 102 applied (if at all) because it was not sufficiently noticed that its compliance with Rule 102 was at issue. Even if the questioning by Commission staff attorney at the end of the proceedings was sufficient to constitute "notice" that the Commission believed a violation of Rule 102 may have occurred, the Company was not afforded an opportunity to argue its position (it was asked to report facts)

and certainly was not apprised that would be facing a financial penalty for the alleged violation—especially one of this magnitude.[8]

Absent an opportunity to test and refute specific claims against it and to present evidence or argument in support of its side of the issues, the Company's federal and state constitutional due process rights were violated. *See Application of Citizens Utilities Company et al.,* 351 P.2d 487 (Idaho 1960) (elements essential to due process include fully advising the applicant of claims against it and provision of full opportunity for applicant to respond to those claims). Furthermore, as a result of these due process violations, there is no evidence in the record to support the Commission's finding that a Rule 102 violation occurred or that the penalty imposed is reasonable or appropriate. The only "evidence" the Commission relied upon to find a violation is the letter from Company's counsel dated May 15, 2002, sent to Mr. Woodbury, responding to his question at the public hearing regarding whether bill-stuffer notice had been provided. The most that the Commission could adduce from that letter was that individual bill-stuffers regarding the Company's Application had not been provided. That letter did not address, however: (1) whether a Rule 102 violation had occurred or (2) what penalty (if any) was appropriate for a Rule 102 violation. The complete absence of record evidence to support the Commission's findings respecting the alleged violation or the reasonableness of the penalty imposed proves that a violation of the Company's constitutional due process guarantees that took place in this proceeding.

2. Statutory Due Process Violation.

Notice and hearing requirements also are provided by Idaho Code § 61-701 and § 61-712. As applicable to this proceeding, Section 61-701 provides:

[8] As demonstrated above, consistent with the sanction provided by Rule 102.05, the Commission has never before imposed a financial penalty for violation of Rule 102. Moreover, as will be demonstrated in Section F below, a financial penalty of this magnitude imposed pursuant to Idaho Code § 61-701 *et seq.* is unprecedented.

> It is hereby made the duty of the commission to see that the provisions of the constitution and statutes of this state affecting public utilities * * * are enforced and obeyed, and that violations thereof are promptly prosecuted and penalties due the state therefor recovered and collected and to this end it may sue in the name of the people of the state of Idaho. Upon the request of the commission, it shall be the duty of the attorney general or the prosecuting attorney of the proper county, to aid in any investigation, hearing or trial had under the provisions of this act *and to institute and prosecute actions or proceedings for the enforcement of the provisions of the constitution and statutes of this state affecting the public utilities and for the punishment of all violations thereof*. (Emphasis added.)

Thus, enforcement of alleged violations pursuant to § 61-701 will take place by way of a separate action or proceeding the institution of which, presumably, would provide notice of some form to the utility against which the law is being enforced.

Likewise, with respect to collection of a civil penalty imposed for a violation, Section 61-712 provides, in part:

> Actions to recover penalties under this act shall be brought in the name of the state of Idaho, in the district court in and for the county in which the cause of action or some part thereof arose, or in which the corporation complained of, if any, has its principal place of business * * *. Such action shall be commensed [*sic*] and prosecuted to final judgment by the attorney of the commission. * * * In all such actions, the procedure and rules of evidence shall be the same as in ordinary civil actions, except as otherwise herein provided. * * *

Together, Sections 61-701 and 61-712 provide the specific manner in which the Commission may exercise its statutory duty to ensure that the public utility statutes "are enforced and obeyed, and that violations thereof are promptly prosecuted."[9] The processes afforded therein contemplate, at the very least, notice and an opportunity for an accused utility to defend itself against the allegations made against it by participating in an action or

[9] *See also* Idaho Code § 61-705 (authorizing Commission to direct its attorney to commence an action or proceeding in district court in name of people of Idaho for purpose of having ongoing or threatened violations stopped and prevented either by mandamus or injunction).

proceeding initiated to enforce the relevant laws or to recover penalties for violations found to have been committed. These procedural safeguards are critical to utilities forced to defend themselves against alleged violations, not just because a finding that a violation occurred could result in the imposition of a financial penalty, but also because the utility's reputation is at stake. *Cf. Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 572 (1972) (included within liberty interests guaranteed by constitutional due process are person's good name, reputation, honor, or integrity; when any of those is at stake because of what the government is doing, notice and opportunity to be heard are "essential").

Although the Commission has in the past afforded accused utilities the procedural safeguards guaranteed in Sections 61-701 and 61-712,[10] it clearly did not afford those safeguards to PacifiCorp when it found *sua sponte* that PacifiCorp violated Rule 102 and that a $1,087,720 penalty should be imposed. The failure to do so violated PacifiCorp's statutory due process rights guaranteed by the penalty provisions of Chapter 61, Title 7.

D. The Commission Misinterpreted the Penalty Provisions of Idaho Code § 61-701 *et seq*.

According to the Commission's Order, violation of Rule 102 "triggers Commission powers to affect an appropriate remedy under the provisions of Title 61, Chapter 7."[11] Applying Idaho Code § 61-706, which provides that the maximum penalty for each offense is $2000, the Commission goes on to find that it "could theoretically" seek a civil penalty against

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[10] *See, e.g., In the Matter of the Investigation of Providing Extended Area Service for Inland Telephone Company's Idaho Exchanges*, Case No. INL-T-91-2, Order No. 25849 (Jan. 9, 1995) (ordering Company to appear and show cause why its failure to comply with Commission's order should not result in civil penalty to be sought in district court); *In the Matter of the Investigation Upon the Commission's own Motion of the Quality of Service of Warm Springs Mesa Water Company*, Case No. WSM-W-93-1, Order No. 25679 (scheduling show cause hearing to give company opportunity to provide evidence to rebut Staff's prima facie case that the company had violated its statutory obligations and should be subject to penalty provisions set out in Chapter 7 of Title 61).

[11] As noted in Section B *supra*, the Company disputes that a violation of Rule 102 triggers the Chapter 61, Title 7 penalty provisions.

the Company of over $108 million. The Commission reaches that result by multiplying $2,000 by the number of customers the Company serves in its Idaho territory, namely 54,386. Rather than impose the "theoretical" $108 million penalty, the Commission finds instead that a fine of $20 per customer is reasonable, resulting in a total penalty of $1,087,720.

The formula the Commission applies in this case to calculate the appropriate penalty for a single violation of a Commission rule—*i.e.,* "X" dollar amount multiplied by the number of customers served—is not supported by the relevant statutes upon which the formula is based.

Idaho Code § 61-706 provides, in relevant part:

> **Penalty for violation. —** Any public utility * * * which fails, omits or neglects to obey, observe or comply with any * * * rule * * * of the commission, under the provisions of this act, in a case in which a penalty has not hereinbefore been provided for, such public utility is subject to a penalty of not more than $2000 for each and every offense.

A related statute, Idaho Code § 61-707, provides, in part:

> **Continuing violation. —** Every violation of the provisions of this act or any other * * * rule * * * of the commission * * * by any public utility * * * is a separate and distinct offense, and in case of a continuing violation each day's continuance thereof shall be and be deemed to be a separate and distinct offense.

Together, those statutes establish that the **maximum** penalty per violation of a Commission rule is $2,000 per day. Nowhere do those statutes suggest that a single violation of a Commission rule, such as that which is alleged to have taken place in this proceeding, can constitute *multiple* offenses. In fact, Section 61-707 provides just the opposite, defining single violations as "separate and distinct" offenses. As such, the maximum penalty that can be assessed for the single Rule violation PacifiCorp is alleged to have committed—absent a finding that that violation was continuing (which was not made in this case)—is $2,000. To

interpret the statutes otherwise would make them subject to constitutional challenge.[12] Fines imposed pursuant to such an interpretation would violate the Excessive Fines clauses to the Eighth Amendment (applicable to the states through the Fourteenth Amendment) to the United States Constitution and Article 1, section 6 of the Idaho Constitution.[13] *See State v. Cobb,* 969 P.2d 244, 246 (Idaho 1998) (noting court's obligation to seek interpretation of statute that will uphold its constitutionality).

The legislative history of Sections 61-706 and 61-707 also supports the Company's position that the maximum penalty provided by the statutes was not intended to apply on a per customer basis. *See AG Services of America, Inc., v. Ketcher ex rel Ketcher*, 44 P.3d 1117, 1119 (Idaho 2002) (court's primary duty when interpreting statute is to give effect to legislative intent ascertainable from the statute's text; court "may also seek edification from the statute's legislative history"). Since 1913 when Section 61-706 was enacted, *its text has remained the same, verbatim.* Idaho Session Laws 1913, ch. 61, § 72a, p. 293-94. With one minor exception not relevant to its interpretation in this case,[14] the text of Section 61-707 also has remained the same since its enactment that same year. Idaho Session Laws 1913, ch. 61, § 72b, p. 294. It is unfathomable that a utility providing service in Idaho in 1913 could have afforded to stay in business were the Commission authorized to impose a $2,000 per customer penalty for a single violation of a Commission order, statute or rule. Even more unfathomable

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[12] By way of example, pursuant to the Commission's interpretation of those statutes, an Idaho Power Company violation of Rule 102 could result in a $739,848,000 penalty ($2,000 multiplied by Idaho Power's 369,924 customers).

[13] As discussed below in Section E, the Commission exceeded its authority under Idaho Code § 61-712 by ordering PacifiCorp to pay the fine imposed directly to customers rather than to the State Treasury. Because fines must be paid to the State Treasury, the Excessive Fines clauses of the state and federal constitutions apply. *See United States v. Bajakajian, 524 U.S. 321 (1998)* (when government, acting with punitive intent, extracts a payment to itself, Excessive Fines Clause applies).

[14] The 1913 version of Section 61-707 provided: "Every violation of the provisions of this Act *or of any order* * * *." Idaho Session Laws 1913, ch. 61, § 72b, p. 294. The current version of that statute provides: "Every violation of this act *or any other order* * * *."

is that pursuant to the Commission's interpretation of the statutes, the 1913 Commission could have imposed a $2,000 per customer penalty *per day* in the case of a continuing violation. The 1913 Idaho Legislature could not have intended such absurd results. Because the statutes have not substantively been amended since their enactment, the original intent of the 1913 Legislature controls.

For all of the foregoing reasons, the Commission's imposition of a $20 per customer penalty totaling $1,087,720 is contrary to Idaho law.[15] The maximum penalty that can be imposed for a single violation under the relevant penalty provisions of Idaho Code § 61-701 *et seq.* is $2,000.

E. The Commission Exceeded Its Authority under Idaho Code § 61-701 *et seq.* when It Required Payment of the Penalty to Customers Instead of to the Idaho State Treasury.

In its Order the Commission concludes that a fine of $20 per customer is reasonable, resulting in a total penalty amount of $1,087,720. The Order further requires that amount to be paid directly to each of the Company's customers in the form of a credit. As the source of its authority to require a direct customer credit, the Commission relies generally upon the provisions of Chapter 61, Title 7.

As noted above, the provision of Chapter 61, Title 7 applicable to the recovery of civil penalties for violation of utility statutes or rules is Section 61-712. That statute provides, in relevant part, that "[a]ll fines and penalties recovered by the state in [an action to recover penalties under Title 61] *shall be paid into the state treasury to the credit of the general fund*." (Emphasis added.) Use of the word "shall" as opposed to "may" denotes a mandatory rather than permissive or discretionary requirement. *Rife v. Long*, 908 P.2d 143, 150 (Idaho 1995).

[15] In addition to being contrary to Idaho law, as demonstrated in Section F *infra*, that conclusion is contrary to the Commission's own precedent. The Commission has never previously applied the statute in this manner or even suggested that this application of the statutes is appropriate.

Accordingly, Commission-ordered payment under Section 61-712 to any place or person other than the Idaho State Treasury is contrary to the plain language of the statute and outside the Commission's authority.

Previous cases indicate Commission recognition of the correct application of Section 61-712. *See, e.g., In the Matter of the Investigation Concerning U S West Communications' Compliance with Telecommunications Service Rule 503, IDAPA 31.41.01.503*, Case Nos. USW-N-95-2, USW-S-95-8, Order No. 26303 (Jan. 19, 1996) (approving consent agreement imposing civil penalty and instructing company to deposit check payable to general fund with the Commission Secretary); *Idaho Public Utilities Commission v. One Call Communications, Inc.,* Consent Agreement (dated Jan. 1995) (wherein One Call agrees to pay sum of $1000 to the general fund of the State of Idaho for alleged violation of Commission's Operator Services and Pay Telephone Rules); *In the Matter of the Investigation of the Washington Water Power Company and its Compliance with WWP-Electric Line Extension Tariff, Schedule No. 51*, Case No. WWP-E-94-9, Order No. 25756 (Oct. 5, 1994) (order requiring Water Power to appear before Commission to show cause why it should not pay a civil penalty of $82,000 to the treasury of the State of Idaho). In this proceeding, however, the Commission failed to abide by the statutory mandate. The Commission's Order that the Company pay its penalty directly to customers in this proceeding is unlawful.

F. The Commission's Interpretation and Application of Idaho Code § 61-701 *et seq*. Results in a Penalty that is Excessive and Contrary to Commission Precedent.

In addition to the deviations from its prior orders noted throughout this Petition, imposition of a per customer penalty for violation of Rule 102 to the tune of over $1 million is without precedent in previous Commission orders in three additional respects: (1) the Commission has never before interpreted its rules to allow penalties to accrue on a per customer basis; (2) the Commission has never before imposed a penalty of this magnitude for *any* type of violation heretofore found under Chapter 61, Title 7; and (3) the Commission has

never before imposed a financial penalty for a violation of Rule 102. The Commission precedent relevant to each of those assertions is discussed in turn.

1. Calculation of Previous Penalties Imposed.

Never before has the Commission interpreted the penalty provisions of Chapter 61, Title 7 to allow penalties to be calculated on a per customer basis. Prior Commission proceedings in which civil penalties for violations were actually imposed or merely threatened demonstrate that the Commission itself has interpreted those statutes to allow a maximum penalty of $2,000 per day for a single violation.

For example, when the Washington Water Power Company ("Water Power") was found to have been in violation of its Schedule 51 line extension tariffs for a period of over three years, or 41 months, the Commission, "[r]ather than seeking *the statutory maximum penalty of $2,000 per day*," concluded that it should seek a civil penalty of $2,000 for each month Water Power violated its line extension tariffs. *In the Matter of the Investigation of the Washington Water Power Company and its Compliance with WWP-Electric Line Extension Tariff Schedule No. 51.*, Case No. WWP-E-94-9, Order No. 25756 (Oct. 11, 1994) (emphasis added). Despite its acknowledgement that "[t]ariffs exist for the protection of the public" and its assertion that it "take[s] the Company's tariffs seriously and * * * expect[s] the Company to do so also," the Commission did not find or even imply that a $2,000 per customer, per day calculation was appropriate.

Similarly, when the Union Pacific Railroad Company failed to comply with a Commission order to maintain a "local presence" in the community of Parma, the Commission determined that rather than impose the "statutory maximum penalty of $2,000 per day" for the violation (which it found had lasted 13 months), it would instead calculate the violation on a per month basis. *Re Union Pacific Railroad Company*, Case No. UP-RR-90-3, Order No. 23773 (Jul. 9, 1991). Again, nowhere in the order did the Commission find or suggest

that the violation, which had arguably affected the residents of Parma specifically and the public generally, constituted a violation against all those actually or potentially affected by it.

Other cases involving the threatened imposition of a civil penalty by the Commission also fail to expressly find or suggest that a single violation could constitute multiple offenses against individual customers actually or potentially affected by that violation. By way of example, after receiving evidence that Warm Springs Mesa Water Company had violated its statutory obligation to provide and maintain adequate service and hearing public testimony that the public welfare had been threatened because the drinking water it was providing to its customers was unsafe, the Commission noted that it found the situation to be "extremely serious." *In the Mater of the Investigation Upon the Commission's own Motion of the Quality of Service of Warm Springs Mesa Water Company,* Case Nos. WSM-W-93-1, WSM-W-94-1, Order No. 25679 (Sept. 15, 1994). The order went on to apprise the company that "Idaho Code § 61-706 provides a fine of $2,000 *for every incident* in which a public utility has violated or failed to comply with any statute or Order" and that "[p]ursuant to Idaho Code § 61-707, these violations are considered to be continuing day to day." (Emphasis added.) Notably, no mention is made of the individual customers the Commission found were actually or potentially affected by the violations. *See, e.g., In the Matter of the Investigation of Providing Extended Area Service for Inland Telephone Company's Idaho Exchanges*, Case No. INL-T-91-2, Order No. 25849 (Jan. 9, 1995) (all customers in Lenore and Lewiston/Lapwai affected by company violation of Commission order; fine threatened calculated as $2,000 per day since violation began); *Idaho Public Utilities v. One Call Communications, Inc.,* Consent Agreement (dated Jan. 1995) (noting that company had been noticed by Staff that penalty for violating Commission rule included "civil penalty of not to exceed $2,000 for each day the violation continues").

In this proceeding, only one violation of a Commission rule is alleged to have occurred. As demonstrated by the preceding discussion of the Commission's own cases interpreting and

applying the penalty provisions of Chapter 61, Title 7, calculation of PacifiCorp's penalty by multiplying the maximum statutory penalty—or even a mitigated version of that maximum amount—by the total number of customers actually or potentially affected by the violation is unprecedented. For that reason, the fine is unduly punitive and excessive.

2. Magnitude of Previous Penalties Imposed.

The $1,087,720 penalty imposed in this proceeding is unprecedented. The largest civil penalty this Commission has ever before imposed is $75,000. *See In the Matter of the Investigation of the Washington Water Power Company and its Compliance with WWP-Electric Line Extension Tariff Schedule No. 51.*, Case No. WWP-E-94-9, Order No. 25816 (Nov. 29, 1994) (approving reduced civil penalty of $75,000 for Water Power's 41-month violation of its Schedule 51 line extension tariffs). Other civil penalties approved by the Commission include a $13,000 penalty assessed against Union Pacific Railroad for its failure to comply with a Commission order (*Re Union Pacific Railroad Company*, Case No. UP-RR-90-3, Order No. 23773 (Jul. 9, 1991)) and a $1,000 penalty agreed to by Consent Agreement against One Call Communications, Inc. for its violation of a Commission rule (*Idaho Public Utilities v. One Call Communications, Inc.,* Consent Agreement (dated Jan. 1995)).

Imposition on PacifiCorp of a penalty that exceeds by 1,350 percent the highest penalty ever approved by this Commission is unreasonable. The circumstances surrounding the Water Power penalty—which heretofore was the highest the Commission had ever imposed—as compared to PacifiCorp's penalty, highlight that unreasonableness.

Water Power was found to have been in violation of its tariffs for a period of **41 months**. The Commission found that Water Power had been "indifferent" to its tariff requirements and that its actions and practice were adverse to the public interest. The Commission also found that by violating its tariffs and it also had violated Idaho Code §§ 61-313 (prohibiting utilities from charging rates other than those filed with Commission) and 61-315 (prohibiting utilities from granting preferential treatment to specific customers).

By contrast, the Commission in this case found a single violation of a Commission rule requiring individual customer notice. It did not find that customers had been inadequately noticed by other means or that actual injury had occurred as a result of the violation. In fact, the only finding made by the Commission in that regard was that "[f]ailure to provide the required individual notice *potentially* limits public participation in our proceeding." There is no evidence to support, however, that public participation actually was limited in this proceeding in any way, nor did the Commission make such a finding.[16]

The Commission's subsequent treatment of Water Power's violation is also enlightening. In 1999, the company filed a general rate case wherein the Commission noted that the company's practices with respect to its Schedule 51 tariffs had not changed, despite the penalty it had been assessed five years earlier. *Re The Washington Water Power Company,* Case No. WWP-E-98-11, Order No. 28097 (Jul. 29, 1999). The Commission also noted in that order that the company had also been in violation of a Commission order requiring annual updates regarding its extension costs **for nine years**. Rather than impose an additional civil penalty for the company's multiple and ongoing violations however, the Commission ordered the company to review its tariffs and comply with them prospectively.

In short, the over $1 million penalty assessed in this proceeding is grossly excessive in light of the violation alleged and as compared to civil penalties imposed previously by the Commission for violations that are more severe in nature and in scope. On that basis alone, the penalty is unreasonable. In addition, the penalty is also arbitrary in that the Commission's Order fails to articulate a reasoned basis for imposing a penalty of this magnitude in this case.

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[16] The Commission in its Order acknowledged that PacifiCorp had complied with the applicable statutory notice requirements. The Commission did not make any findings in its Order that customers did not receive actual notice of PacifiCorp's Application, and the attendance of customers and legislative representatives at the workshops and public hearings in Rigby and Preston would belie any such findings. One member of the public, Timothy Shurtz, formally intervened in the proceeding and participated in all aspects of the case.

See, e.g., Application of Boise Water Corp., 916 P.2d 1259, 1262 (Idaho 1996) ("In addition to making findings of fact based on substantial, competent evidence, the IPUC must explain the reasoning employed to reach its conclusions in order to ensure that the IPUC has applied the relevant criteria prescribed by statute or its own regulations and has not acted arbitrarily or capriciously."); *Washington Water Power v. Idaho Public Utilities Comm'n*, 617 P.2d 1242, 1250 (Idaho 1980) ("Not only must the Commission make and enter proper findings of fact, but it must set forth its reasoning in a rational manner.").

3. Previous Violations of Rule 102.

As noted previously in this Petition, the Company could not find a single instance in which the Commission has applied the Rule 102 notice requirements outside a general or tracker rate case. Moreover, in those general or tracker rate cases in which the Rule has been applied, a financial penalty pursuant to Chapter 61, Title 7 **never has been imposed for its violation.** In fact, the Company could find only one case in which the Commission has taken *any* action with respect to a Rule 102 violation. *See Re Intermountain Gas Company*, Case No. INT-G-99-1, Order No. 28087 (Jul. 1, 1999), (suspending proposed effective date of tracker rate change for additional 30 days for violation of Rule 102).[17] In the case of Avista, recurring violations of Rule 102 notice requirements resulted in nothing more than a reminder from the Commission Staff that under Rule 102.05, the Commission *could have* returned its application for a tracker rate change as incomplete. *See Re Avista Corporation dba Avista*

[17] In *Re The Washington Water Power Company*, Case No. WWP-E-98-11, Order Nos. 28097 and 28155, the Commission noted that the company had failed to adequately notice its customers as required by Rule 102 when it denied the company's proposed equity adder. This, however, was not a punitive or remedial action by the Commission for a Rule 102 violation. As the Commission itself acknowledged, denial of the adder was based on the company's failure to satisfy the minimum threshold qualification for equity adder consideration. In the Commission's own words, that denial had not taken away anything to which the company was otherwise entitled.

Utilities Washington Water Power Division, Case No. AVU-E-00-2, Order No. 28366 (May 2, 2000) (no action taken by Commission when Rule 102 notice "once again deficient").

The Commission's decision in this case to impose a financial penalty for an alleged violation of Rule 102 deviates significantly from its prior practice with respect to violations of that Rule. This departure from past practice is especially unreasonable in light of the magnitude of the penalty imposed.

Irrespective of whether the Commission views its decisions regarding the alleged violation in this proceeding as quasi-judicial or regulatory, the Commission was, at the very least, required to explain the reason for its departure from past practice. *See Washington Water Power Co.*, 617 P.2d 1242, 1254 (when decision is one of regulatory action, as distinguished from quasi-judicial decisions which require application of law or policy to past facts, Commission may change or alter previously adopted policies but is required to explain reasons for change). As the precedent cited throughout this Petition demonstrates, the Commission's decisions in this case regarding the Company's alleged violation of Rule 102 are squarely at odds with the Commission's handling of similar circumstances in previous decisions. Unless this inconsistency can be explained by distinguishing this precedent or a justification provided for departing from it, "the Commission has not adequately explained its departure from prior norms and has not sufficiently spelled out the legal basis of its decision." *Secretary of Agriculture v. U.S.*, 347 U.S. 645, 653 (1954).

STATEMENT OF EVIDENCE OR ARGUMENT PACIFICORP WILL OFFER IF RECONSIDERATION IS GRANTED

Based on the argument contained herein, the evidence described below and the attached affidavit, PacifiCorp hereby requests that the Commission grant reconsideration of Order No. 29034 for the limited purpose of rescinding its findings related to Rule 102 and withdrawing the civil penalty imposed by the Order. In the event reconsideration is granted and the Commission wishes to hold an evidentiary hearing on the issues raised by this Petition

or to hear oral argument regarding the matters contained herein (Idaho Code § 61-626(2); IDAPA 31.01.01.332), PacifiCorp will offer the arguments asserted in this Petition as well as the following evidence (IDAPA 31.01.01.331):

1. Evidence of Actual Notice to PacifiCorp's Customers.

In addition to the notice required by Idaho Code § 61-307 (filing of proposed schedules with Commission and keeping schedules open for public inspection)—which the Commission found was satisfied in this case—PacifiCorp submits the following as evidence that customers were on actual notice of this temporary rate surcharge proceeding:

12/22/01 Newspaper Article. Post-Register, Idaho Falls, ID *Credits likely to offset Utah Power rate hike* – ". . . the company will likely be filing a rate increase with the Idaho Public Utilities Commission on Jan. 4, but customers will probably benefit." "As a result of credits that customers in Idaho receive through the Bonneville Power Administration, there will be a change in our prices, but the trend is toward stability or even downward for prices our customers will pay . . ."

01/07/02 Company-Issued Press Release. *Utah Power files power cost; BPA case* – "Utah Power filed a request with the Idaho Public Utilities Commission January 7 to adjust customer rates and implement a new credit . . ." "In fact, if the company's overall proposal is approved, many customers will see net decreases in their bills."

01/24/02 Newspaper Article. The Morning News, Blackfoot, ID *PacifiCorp/Utah Power requests excess power costs be recovered* – "PacifiCorp/Utah Power is asking the Idaho Public Utilities Commission to recover, over the next two years, $38 million in excess power costs the company incurred . . ." "However, the company also wants to implement a credit from the Bonneville Power Administration of nearly $70 million over that same two-year period that will more than offset the surcharge the company proposes. The result should be about a 7.8 percent decrease in rates during the first year . . ."

01/31/02 Commission-Issued Press Release. IPUC, Boise, ID *BPA credit will result in average 44 percent reduction for Utah Power customers* – " . . . Utah Power has also filed an application with the commission to recover $38 million in power supply costs the company incurred during the last two years. The company requests to recover the amount over two years . . ."

02/01/02 Company-Issued Press Release. *BPA credit to take effect Feb. 1* – ". . . Meanwhile, Utah Power's rate adjustment proposal before the Idaho Public Utilities Commission is proceeding, with hearings to occur later this spring. (The proposal was announced in a news release Jan. 7.)"

02/26/02 Commission Order. *Notice of Issue Identification and Notice of Scheduling* – "YOU ARE FURTHER NOTIFIED the Company's proposal to change its electric service schedules is subject to the Commission's approval. The Commission may approve, reject or modify the requested changes in rate schedules. The Commission may determine PacifiCorp's rates and charges in an amount other than proposed by the Company and/or the spread or allocation or relative increase or decrease in any rate or charge may be other than that proposed by the Company. *The rates and charges of all customers of PacifiCorp in the State of Idaho, including those governed by special contract, are at issue and subject to change in this proceeding.*" (Emphasis added.)

02/27/02 Commission-Issued Press Release. IPUC, Boise, ID *PacifiCorp-Utah Power proposing significant changes to its rate schedules* – "PacifiCorp-Utah Power is proposing significant changes in its rate schedules to customers in a case pending before the Idaho Public Utilities Commission. The company's proposed rate adjustments may not be noticed by residential and small-farm customers because of the sizeable Bonneville Power Administration credits that became effective earlier this month."

03/04/02 Newspaper Article. The Morning News, Blackfoot, ID *Utah Power proposes rate schedule changes* – "PacifiCorp/Utah Power is proposing significant changes in its rate schedules to customers in a case pending before the Idaho Public Utilities Commission. The company's proposed rate adjustments may not be noticed by residential and small-farm customers because of the sizeable Bonneville Power Administration credits that became effective earlier this month."

03/06/02 Newspaper Article. News-Examiner, Caribou Co., ID *PacifiCorp proposing changes in rates schedules to customers* – "PacifiCorp/Utah Power is proposing significant changes in its rate schedules to customers in a case pending before the Idaho Public Utilities Commission. The company's proposed rate adjustments may not be noticed by residential and small-farm customers because of the sizeable Bonneville Power Administration credits that became effective earlier this month."

03/13/02 Newspaper Article. Standard Journal, Rexburg, ID *PacifiCorp proposing significant changes to its rate schedules* – "PacifiCorp/Utah Power is proposing significant changes in its rate schedules to customers in a case pending before the Idaho Public Utilities Commission. The company's proposed rate adjustments may not be noticed by residential and small-farm customers because of the sizeable Bonneville Power Administration credits that became effective earlier this month."

03/20/02 Newspaper Editorial. Post Register, *You asked for it – Utility bills bring surprise* – ". . . Utah Power has filed an application with the Idaho PUC to recover $38 million in power supply costs over two years that the company incurred buying expensive power . . . But even if that's approved, bills would still be an average of 8 percent lower than current amounts."

04/03/02 Newspaper Editorial. Post-Register, Idaho Falls, ID *When is a promise not a promise?* – ". . . in an application filed Jan. 7, PacifiCorp requested authorization to recover the $38 million in power supply costs the company incurred during the past two years."

04/04/02 Newspaper Editorial. Idaho Enterprise, Franklin Co., ID *Senator Geddes: Are you a PacifiCorp customer? What is happening to your power bill? When is a promise not a promise?* – ". . . in an application filed Jan. 7, PacifiCorp requested authorization to recover the $38 million in power supply costs the company incurred during the past two years."

04/05/02 Newspaper Editorial. Idaho Statesman *PacifiCorp is unfairly pushing rate hikes on public* –". . . in an application filed Jan. 7, PacifiCorp requested authorization to recover the $38 million in power supply costs the company incurred during the past two years."

04/10/02 Newspaper Editorial. News-Examiner, Montpelier, ID *When is a promise not a promise* – ". . . in an application filed Jan. 7, PacifiCorp requested authorization to recover the $38 million in power supply costs the company incurred during the past two years."

04/10/02 Newspaper Editorial. Citizen, Preston, ID *What exactly does "no rate increase" mean?* – ". . . in an application filed Jan. 7, PacifiCorp requested authorization to recover the $38 million in power supply costs the company incurred during the past two years."

04/12/02 Newspaper Article. AP Newswires, Boise, ID *Idaho regulators: Recovery request doesn't violate agreement* – ". . . PacifiCorp filed an application on Jan. 2 [sic] seeking authority to recover about $38 million in extraordinary power supply costs incurred . . ."

04/13/02 Newspaper Article. Post Register, Idaho Falls, ID *PUC says PacifiCorp can apply to raise rates* – ". . . the Idaho Public Utilities Commission rules that PacifiCorp can apply to raise its power rates to recoup costs . . ." "Moreover, the costs PacifiCorp seeks to recover are not merger-related, they said, but attributable to 'extraordinarily high wholesale market prices outside the control of the company.'"

04/15/02 Newspaper Article. The Morning News, Blackfoot, ID *IPUC rules PacifiCorp application does not violate moratorium* – ". . . the Idaho Public Utilities Commission has ruled that PacifiCorp's application seeking recovery for costs the utility incurred buying power on last year's high-priced wholesale market is not a violation . . ."

04/24/02 Newspaper Editorial. Standard Journal, Rexburg, ID *Utilities Commission to hold hearings on PacifiCorp case* – "PacifiCorp is attempting to recover about $22.7 million over a two-year period in power supply costs." "The commission will conduct workshops and public hearings in Rigby on May 6 and in Preston on May 7. A workshop will be held at 6 p.m. with staff available to explain the company's request and take questions from the public."

04/25/02 Newspaper Article. Idaho Enterprise, Malad City, ID *Public hearings should be held on ScottishPower/PacifiCorp rate increase* – "I am writing . . . to request that the Idaho Public Utilities Commission conduct a series of public hearings . . . relative to any possible rate increase . . ."

04/29/02 Newspaper Article. Post-Register, Bonneville Co., ID *Power rate hearings set for May* – ". . . PacifiCorp has asked permission to recover about $22.7 million over a two-year period in power supply costs the company incurred . . ."

05/01/02 Newspaper Article. News-Examiner, Montpelier, ID *IPUC sets hearings in Preston for PacifiCorp cost recovery case* – "The Idaho Public Utilities Commission will conduct hearings in Rigby and Preston . . ." "The hearings will address PacifiCorp's request to recover power supply costs, what the effect will be on each customer class, and changes to the irrigation rate . . ."

05/02/02 Newspaper Article. Idaho Enterprise *IPUC sets hearings in Preston for PacifiCorp cost recovery case* – "The Idaho Public Utilities Commission (IPUC) will conduct hearings in Rigby and Preston . . ." "The hearings will address PacifiCorp's request to recover power supply costs, what the effect will be on each customer class, and changes to the irrigation rate . . ."

05/03/02 Newspaper Editorial. Standard Journal, Rexburg, ID *You need to know* – ". . . The Commission is holding a public workshop on Monday, May 6, at 6 p.m. . . . to explain PacifiCorp's position and to take questions and comments from the public."

05/04/02 Newspaper Article. The Morning News, Blackfoot, ID *IPUC to hold hearings on PacifiCorp* – "The Idaho Public Utilities Commission will conduct hearings in Rigby and Preston regarding a stipulated settlement that would allow PacifiCorp to recover about $22.7 million over two years in power supply costs."

05/29/02 Newspaper Editorial. Post-Register, Idaho Falls, ID *PacifiCorp's bailout* – "*Having followed commentary in the newspapers and on television . . .* [regarding] PacifiCorp's request to raise the electrical rates it charges." (Emphasis added.)

Further evidence that customers were actually on notice of the issues raised by the Application in this proceeding is the degree to which the public participated in this proceeding from beginning to end. PacifiCorp's residential customers were represented throughout the case by intervenor Timothy Shurtz, who made significant efforts to ensure that PacifiCorp customers were on notice of the proceeding.[18] Monsanto and the Irrigators also intervened and

[18] *See* Application for Intervenor Funding filed by Timothy Shurtz (referencing the "many hours [spent] dealing with public information and notification of the proposed cost recovery by Utah Power"; his assessment that he represented "a very wide class of customers: residential, business, and farming"; and his "work to inform the public through many hours of work with the media").

participated in this proceeding in its entirety.[19] Finally, the high level of public attendance, including several state legislators, at the public hearings in this case is significant and cannot be ignored.

Based on the foregoing, PacifiCorp submits that its customers had sufficient actual notice of its Application in this proceeding and that, even if Rule 102 applies, no penalty for violation of that rule is warranted. *Cf. Estate of Keeven v. Estate of Keeven*, 882 P.2d 457, 463 (Idaho App. 1994) (when party had actual notice of issues to be addressed and relief sought and was not prejudiced by inadequate notice, court will not grant relief for what is, at most, harmless error).

2. Evidence of PacifiCorp's Good Faith Compliance with the Commission's Notice Requirements.

In support of this Petition, PacifiCorp submits the attached affidavit of Douglas Larson, Vice President of Regulation, demonstrating that the Company made a good faith effort to comply with the Commission's notice requirements and that if its failure to provide bill-stuffer notice of its Application in this proceeding was in error, it was at most a good faith mistake and is not deserving of a monetary penalty.

When it filed its Application in this case, the Company reviewed the Commission's notice rules and took steps to ensure compliance. Before the filing was made, the Company consulted with its counsel regarding whether Rule of Procedure 122 (60-day advance notice of intent to file a general rate case) applied to this filing. Counsel reviewed the rule and advised PacifiCorp that Rule 122 did not apply because this was not a general rate case.

[19] Although Nu-West Indistries did not participate in negotiation of the Stipulation, the Commission found Nu-West had legal notice of these proceedings and technically could have participated. Order No. 29034 at 20.

After filing the Application, issuing a press release, and complying with the notice prescribed by Rule of Procedure 123 and Idaho Code § 61-307 (filing of proposed schedules with Commission and keeping schedules open for public inspection), the Company consulted with its counsel regarding the applicability of Rule 102 to this filing. The Company's counsel reviewed the Rule and advised the Company that, because this was neither a general nor a tracker rate case, bill-stuffer notice under Rule 102 was not required.

Based on that advice, the Company did not provide bill-stuffer notice to customers regarding its Application. Even though it did not think bill-stuffer notice was required by Commission rule (based on counsel's advice), the Company nevertheless considered providing individual notice of its Application to its customers. In its experience, however, customers can be confused by multiple notices regarding the same rate filing,[20] and, for that reason, the Company instead decided that it would individually notify customers when the Commission issued a decision regarding its Application (if that decision resulted in a rate change). As noted, the Commission approved the proposed Stipulation on June 7 and, as a result, customers' rates were changed effective with service on and after June 8, 2002. Accordingly, PacifiCorp is currently notifying its customers individually regarding the nature of those changes by way of a bill message

As demonstrated by the foregoing, any failure of the Company to comply with Rule 102, if it applied, was not because it failed to take seriously compliance with Commission rules or even because of an administrative oversight. Rather, it was based on consideration of the Rule, advice of counsel and a determination that the Rule did not apply to this proceeding. Because the mistake (if the Company's reading of the Rule was in error) was the result of

[20] *See Re Idaho Power Company,* Case No. IPC-E-02-3, Order No. 28995 (April 8, 2002) (Commission granted waiver of Rule 102 notice because multiple bill stuffers might confuse customers; in lieu of bill stuffers, alternative form of notice (paid advertisements) deemed in public interest).

timely, good faith efforts to ensure compliance with the Commission's notice requirements, the Company should not be penalized for its failure to provide bill-stuffer notice of its Application.

3. Further Evidence to Consider in Mitigation.

Finally, even if bill-stuffer notice been provided, no information would have been presented other than that which was before the Commission at the conclusion of the proceedings in this case.

As noted above, the public hearings in this proceeding were well attended, including 10 state legislators in Rigby (one by letter submission) and eight state legislators in Preston (five current and three former). At those hearings, 18 members of the public commented on the record. In addition, in response to the notice and press reports regarding the Stipulation, Nu-West petitioned to intervene late and its petition was granted without opposition by the Company. As proof of the effectiveness of late intervention, Nu-West was successful in altering the terms of the Stipulation to exclude itself from the rate increase. Moreover, the issues regarding this rate increase were thoroughly explained by the Staff and Company in the workshops and well aired in the public meetings. By the time the public meetings were concluded, there was no indication of any issues that could be productively addressed in further proceedings.

CONCLUSION

WHEREFORE PacifiCorp respectfully petitions for reconsideration of the Commission's findings in Order No. 29034 that PacifiCorp violated Rule 102 of the Commission's Utility Customer Information Rules and that a $20 per customer credit, or a total of $1,087,720, is an appropriate penalty under Idaho Code § 61-701 *et seq.* for said violation.

Upon reconsideration, the Commission should find that Rule 102 does not apply to this proceeding and that, therefore, no penalty for an alleged violation of that Rule applies.

DATED: June 28, 2002.

Respectfully submitted,

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